No. 89-700

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ASTROLINE COMMUNICATIONS COMPANY
LIMITED PARTNERSHIP,

Petitioner,

v.

SHURBERG BROADCASTING OF HARTFORD, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC. AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

This brief is submitted by the National Association of Black Owned Broadcasters, Inc. ("NABOB") as amicus curiae. Amicus has secured the consent of each party to the filing of this brief. Amicus supports the position of petitioner in this case and urges reversal of the decision below.

NABOB is the trade association representing the interests of the 180 commercial radio and 18 com-

mercial television stations across the country owned by African Americans. NABOB has two principle objectives: to increase the number of African American owners of radio and television stations, and to improve the business climate in which African American owned radio and television stations operate.

Some of NABOB's members have acquired stations through the distress sale policy and other members may acquire stations pursuant to the distress sale policy in the future if that policy is found to be constitutional by the Court. Therefore, NABOB and its members have a very significant interest in the outcome of this proceeding and can provide to the Court the perspective of many potential and past beneficiaries of the Federal Communications Commission ("FCC") policy at issue here.

SUMMARY OF ARGUMENT

The FCC's minority distress sale policy serves an important public interest benefit by providing an opportunity for minorities to become station owners. Minority station owners bring diversity to broadcast programming by bringing a minority perspective to programming decisions. Minorities were excluded from participation in the broadcast industry at its inception, due to both *de jure* and *de facto* discrimination, and it is unrealistic to suggest that a color-blind approach to FCC policies is sufficient to assure diverse ownership of the nation's broadcast facilities. The potential displeasure of nonminorities is not an adequate reason for eliminating the minority distress sale policy. While some nonminorities may stigmatize minorities because of the distress sale policy, minorities have lived with and continue to live with much worse

stigmas, many of which have been created or fostered by the nonminority controlled media.

A Congressionally approved racial preference policy such as the distress sale policy should not be reviewed by this Court pursuant to the "strict scrutiny" standard, but should be reviewed according to the less stringent *Fullilove* standard. However, the distress sale policy is constitutional even under the strict scrutiny standard, because the distress sale policy serves a compelling interest and is narrowly tailored to serve that compelling interest.

ARGUMENT

I. THERE ARE IMPORTANT PUBLIC INTEREST BENEFITS WHICH WILL RESULT FROM A DETERMINATION THAT THE DISTRESS SALE POLICY IS CONSTITUTIONAL

In order to place this case in proper perspective, it is necessary for the Court to answer two questions: What overall public interest benefit does our nation obtain by a determination that the distress sale policy is constitutional? What overall public interest harm might our nation incur from a determination that the distress sale policy is constitutional?

On the benefit side, we must begin with a clarification of a key point raised by Judge Silberman below. In his separate opinion below, Judge Silberman simplistically suggested that the societal benefit which is achieved by the implementation of the distress sale policy is "minority programming." *See Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 922-923 (D.C. Cir. 1989) (separate opinion of Silberman, J.). This characterization is misleading and patronizing. Although many minority owners have used

the airwaves to help eliminate the dearth of minority oriented programming[1], to suggest that their contributions have been limited to minority programming is to do an injustice to the efforts of these broadcasters. Minority owners contribute to the overall commerce of their respective communities in three crucial arenas: increased employment opportunities for minorities in management as well as staff positions; increased business opportunities for ancillary minority businesses as well as minority vendors and suppliers; and increased training opportunities for minority students.

Minority station owners also bring to the airwaves diversity of control over programming decisions. It is narrow-minded to presume that all programming which appeals to minorities is "minority programming." Similarly, programming which might be described as "minority programming" often appeals to nonminorities. (The long-running number one television program, "The Cosby Show," graphically illustrates this phenomenon.)

The minority owner brings to the airwaves a minority perspective on programming, which has been lacking in an industry dominated by white males. This input is most influential in the news area. While a responsible broadcaster does not consciously slant news stories to appeal to any particular racial audi-

[1] The Congressional Research Service has determined that minority station owners, particularly African American owners, tend to do minority oriented programming and that there is a nexus between minority ownership and minority oriented programming. Congressional Research Service, Library of Congress, *Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?* (1988) at CSR-13, CSR-27.

ence, all broadcasters must decide daily what is "news." Whether to carry a story about a local councilman's speech on drug abuse instead of a report on political developments in Eastern Europe, whether to do a thirty second story or a two minute story on an abortion march, whether to report an incomplete story on possible political corruption or to hold it until additional research can be done, are the types of decisions made several times each day by broadcasters. These are subjective decisions. The personal background of the person making these decisions necessarily will influence the decisions he or she makes. The results of these news decisions will often go a long way toward shaping public awareness and ultimately public opinion about the issues and people in the news.

In a nation built upon the premise of "free speech" and the sanctity of allowing differing views to be heard, it is a failure of national broadcast policy that diverse opinions rarely can be found on the nation's airwaves. Through its minority ownership policies, which are designed to provide and to preserve diversity, the FCC represents the only government outpost still true to the tenets of the First Amendment and of Congress's intent when it formulated the Communications Act of 1934. While the societal benefits of a free press are not being challenged directly in this proceeding, the FCC's recognition that a free press must include outlets of expression for all members of a pluralistic society is being challenged. The FCC has recognized that certain segments of our society historically have been denied access to the exercise of their free speech rights and that such denial harms all of society because the entire society has

been denied its rights to experience and consider differing opinions.

The FCC, through its distress sale policy, attempted to facilitate minority voices in the exercise of their First Amendment freedoms through participation in ownership of stations and control of programming decisions. In order to accomplish this, the FCC embraced a very basic principle of business and democracy: ownership is control.

Those concerned about the possibility of public interest harm resulting from upholding the distress sale policy often raise two issues: (1) Does this policy create reverse discrimination against nonminorities? (2) Does this policy stigmatize minorities? In *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), Justice O'Connor, writing the primary opinion, was clearly concerned about both of these issues. Considering first the issue of reverse discrimination, any policy which allocates a finite resource between competing interests will always leave one of those interests without that resource. Every time Congress decides to make the age old choice between "guns or butter," it deprives some interest group of a resource. However, allocation of resources is not discrimination, it is the making of a choice. As is clear from the discussions elsewhere in this brief, Congress has a compelling interest in making the choice to allocate broadcast resources so as to encourage minority ownership. More importantly, the choice at issue in this proceeding is one which Congress would not have been required to make were there not a history of racial discrimination in American society.

However, the above answer does not address a side issue to the reverse discrimination issue. That issue

is: Does this policy create a public perception of reverse discrimination? In other words, does this policy inflame racial tensions by making nonminorities feel that minorities are being treated better than nonminorities? The answer to this question is very subjective. In all candor, the answer may be that some nonminorities do feel this way. However, the possibility of those feelings cannot deny the fact of or erase the impact of a history of slavery and subsequent society-wide discrimination endured by African Americans. The court cannot ignore the evil of a history of racism which has created the need for the policy we must defend herein. In the face of such a well documented and historical pattern of racial misconduct such as exists in the United States, it is a cruel twist of the intent of the Thirteenth and Fourteenth Amendments to even suggest that a policy as benign as the distress sale policy could result in reverse discrimination. Slavery did exist. "Jim Crow" laws did exist. "Separate but equal" did exist, until this Court finally overturned that injustice. We cannot sweep away, under some vague notion of "possible" reverse discrimination, the vestiges of those documented patterns of racial misconduct, perhaps in the faint hope that memories of this sad past will simply fade away. The distress sale policy is an effort to face the realities of our racial history head on and to attempt some recompense. The Court cannot allow potential hostility to its decision to cloud the obvious public interest benefits to be achieved from upholding the constitutionality of the distress sale policy.

Finally, we note that the Court may be concerned about the societal impact of stigmatizing minorities. As the trade association of African American owners

of broadcast facilities, NABOB is uniquely qualified to address the issue of stigmatizing minorities in the context of the distress sale policy, because some NABOB members have acquired broadcast stations through use of the distress sale policy.

In addressing the issue of stigmas the Court must begin by recognizing that stigmas are not new to African Americans, or to most racial minorities in America. Every day African Americans see and hear in the broadcast media images and commentaries which negatively stigmatize all African Americans. We bear a stigma which in Boston allowed Charles Stuart, an apparent murderer, to essentially use racism to cloak his crime. The majority controlled media were used by Stuart to create a climate of hysteria and racial tension which lasted for weeks. Perhaps, if there had been one African American controlled television station in that city, objectivity, and maybe the truth, might have found the light of day much sooner. The Stuart case is an extreme example of the daily situation in which African Americans bear the stigma of the Willie Horton's of the world, the rapists, the crack dealers, the crack users, the robbers, and the murderers. The many positive accomplishments of African American businessmen and businesswomen, politicians, doctors, educators and other professionals are rarely "news worthy" in the eyes of those who control the major communications facilities in this country.

It may be that there are those who would stigmatize those minorities benefiting from the FCC's minority distress sale policy. However, as owners of broadcast stations, we know that the broadcast industry evolved in the early 20th century at a time

when African Americans lived under *de jure* segregation in the south and *de facto* segregation in the north. Therefore, African Americans had no equal opportunity to become the leaders of that industry, which was mature before its doors were ever open to us. By the time the doors were opened, not only racial discrimination but its tandem economic stratification prevented our advancement. Therefore, any potential stigma which may attach to acquiring a station through the distress sale policy pales to nothingness when compared to the stigma of having to watch our community portrayed, spoken for, spoken to and analyzed by voices which are not our own. The Court need not look to protect us from the stigma of receiving preferential treatment. Rather, we request that the Court protect our children from growing up in a society where the broadcast industry does not reflect meaningful ownership and programming control by African Americans.

II. THE STRICT SCRUTINY STANDARD OF REVIEW APPLIED IN THE *CROSON* CASE IS NOT APPROPRIATE FOR REVIEW OF THE FEDERAL COMMUNICATIONS COMMISSION'S CONGRESSIONALLY APPROVED DISTRESS SALE POLICY

In *Croson*, this Court articulated the principal issues it will consider when balancing interests between the Fourteenth Amendment's guarantee of equal treatment to all citizens and the use of racial preference policies to ameliorate the effects of past discrimination on the opportunities enjoyed by members of racial minority groups in our society. In writing the principal opinion for the majority in *Croson*, Justice O'Connor relied heavily upon the Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Justice O'Connor explained that "Congress, unlike any State

or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *Croson*, 109 S. Ct. at 719. She added, "The power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principals of equality and to adopt prophylactic rules to deal with those situations." *Id.* (emphasis in original). Thus, Justice O'Connor began from the proposition that "Congress may identify and redress the effects of society-wide discrimination." *Id.* Justice O'Connor stated that this substantially distinguished the facts of the *Croson* case from those of the *Fullilove* case:

> We do not, as Justice MARSHALL's dissent suggests, find in Section 5 of the Fourteenth Amendment some form of federal pre-emption in matters of race. We simply note what should be apparent to all—Section 1 of the Fourteenth Amendment stemmed from a distrust of state legislative enactments based on race; Section 5 is, as the dissent notes, 'a positive grant of legislative power' to Congress. Thus, our treatment of an exercise of Congressional power in *Fullilove* cannot be dispositive here [in *Croson*].

Id. at 720 (citations omitted).

Moreover, in recognition of Congress's unique power in this area, Justice O'Connor also recognized that the "strict scrutiny" standard is not appropriate for review of Congressional action with respect to race-conscious distinctions. Justice O'Connor's opinion recognized that the "strict scrutiny" standard of review is to be reserved solely for State and political

subdivision legislative actions based on race. *See Id.* at 719. Thus, Justice O'Connor noted without criticism that the Court in *Fullilove* did not specify a "strict scrutiny" standard of review for Congressional action. As Justice O'Connor observed:

> The principal opinion in *Fullilove*, written by Chief Justice Burger, did not employ "strict scrutiny" or any other traditional standard of equal protection review. The Chief Justice noted at the outset that although racial classifications call for close examination, the Court was at the same time, "bound to approach [its] task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the. . .general Welfare of the United States' and 'to enforce by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment."

Id. at 717-718.

Justice O'Connor then made the following observation concerning the principal opinion in *Fullilove*:

> The principal opinion asked two questions: first, were the objectives of the legislation within the power of Congress? Second, was the limited use of racial and ethnic criteria a permissible means for Congress to carry out its objectives within the constraints of the Due Process Clause?

Id. at 717 (citation omitted).

Thus, applying *Fullilove*, the Court's review of the Commission's implementation of the distress sale pol-

icy should focus similarly, i.e.: (1) is the implementation of the policy by the Commission consistent with Congress's mandate that the Commission act to promote ownership of broadcast facilities by racial minorities, and (2) was the limited use of racial criteria a permissible means for Congress to carry out its objectives within the constraints of the Due Process Clause? Under the "strict scrutiny" standard the Court would inquire as to whether there was (1) a "compelling interest" for Congress to adopt a racial classification and (2) whether the means used to address that compelling interest were "narrowly tailored" to address that compelling interest. *See Id.* at 721. Although *Croson* did not hold that the "strict scrutiny" standard should be applied to Congressional action, as we shall demonstrate below, the minority distress sale policy meets the more stringent "strict scrutiny" standard of review.

III. THE CONGRESS HAS A COMPELLING INTEREST IN ENCOURAGING OWNERSHIP OF BROADCAST STATIONS BY RACIAL MINORITIES TO ENHANCE THE DIVERSITY OF BROADCAST VOICES

A. Congress has Repeatedly Determined that the Distress Sale Policy Serves a Compelling Interest

In the decision below, Chief Judge Wald issued a well-reasoned, detailed dissent setting forth the compelling interest at issue in this case. *See Shurberg*, 876 F.2d at 934. Discussing the decisions of this Court in *Croson*, *Fullilove*, *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Judge Wald pointed out that a majority of the Court has squarely held that the remediation of prior racial discrimination is a sufficiently compelling interest to

justify the use of racial preferences. Judge Wald added that Justice Powell's opinion in *Bakke* also recognized as compelling the state's interest in promoting diversity within the context of higher education. Judge Wald pointed out that in the D.C. Circuit it has been held that use of a minority racial preference by the FCC in comparative licensing hearings is a constitutional means of obtaining a diverse mix of broadcasters. *See Shurberg*, 876 F.2d at 935 (citing *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985)). Moreover, as the following description of the history of the FCC's minority ownership policy demonstrates, and as Judge Wald recognized, Congress has repeatedly approved use of racial preference policies by the FCC, including the continued use of the distress sale policy. *See Shurberg*, 876 F.2d at 938-941.

The FCC is a creation of Congress and it derives its authority from that body. In 1982 the Congress directed the FCC to provide a minority ownership preference when it awards broadcast licenses by lottery. In so doing, the Conference Committee stated in its report:

> The underlying policy objective of these preferences is to promote the diversification of media ownership and consequent diversification of programming content. This diversity principle is grounded in the First Amendment.

H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40 (1982).

The Conference Committee added:

> An important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities—groups that traditionally have been extremely underrepresented in the ownership of telecommunications facilities and media properties. The policy of encouraging diversity of information sources is best served by not only awarding preferences based on the number of properties already owned, but also by assuring that minority and ethnic groups that have been unable to acquire any significant degree of media ownership are provided an increased opportunity to do so.

Id. at 43.

In 1987, Congress acted to prevent the FCC from repealing or altering these minority ownership policies. *See* Pub. L. No. 100-202, 101 Stat. 1329 (1987); *See also* H.R. Conf Rep. No. 498, 100th Cong., 1st Sess. 504 (1987). The Senate Appropriations Committee, which reported out this provision, explained:

> The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences.

S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987).

Congress extended the prohibition through fiscal year 1989, *see* Departments of Commerce, Justice, & State, the Judiciary, and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216-2217, and has recently renewed that extension for the current fiscal year, 1990. *See* Departments of Commerce, Justice, & State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020-1021.

Moreover, not only has the Congress legislated in this area, but it also repeatedly has held hearings to monitor the FCC's implementation of the minority ownership policies. *See, e.g., Hearings on H.R. 2763 Before a Subcomm. of the Senate Comm. on Appropriations*, 100th Cong., 1st Sess. Pt. 1, at 17-19, 75-77 (1987); *Minority-Owned Broadcast Stations: Hearings on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. (1986); *Minority Participation in the Media: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983); *Parity for Minorities in the Media: Hearings on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983).

The Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation held hearings on September 15, 1989 to examine further the issue of minority ownership of broadcast stations. *See Hearing on Minority Ownership of Broadcast Stations Before the Subcomm. on Communications of the Senate Comm. on Communications, Science and Transportation*, 101st Cong., 1st Sess. (Comm. Print Sept. 15, 1989) (unpublished).

Thus, it is clear that the FCC's distress sale policy was established and has been applied under the direction of the Congress to foster what Congress has determined is a compelling federal interest. Indeed, Judge Silberman in his separate opinion below conceded that, "Congress has not disapproved the use of racial preferences as a means of carrying out the Commission's view of the 'public interest,' and has in fact authorized their use in certain licensing decisions." *Shurberg*, 876 F.2d at 909-10.

B. The FCC Developed an Extensive Record Demonstrating the Compelling Interest in Promoting Diversity of Ownership Through Use of the Minority Distress Sale Policy

The FCC has historically recognized that diversity of control of the media of mass communications constitutes a primary objective of its broadcast licensing scheme. *See Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 5 Rad. Reg. 2d 1901, 1908 (1965) (hereinafter *Comparative Policy Statement*). Indeed, the Commission recognized in the *Comparative Policy Statement* that "maximum diffusion of control of the media of mass communications" was one of two primary objectives toward which the comparative process should be directed. *Id.* In doing so the Commission adopted the Supreme Court's rationale that the First Amendment, "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Id.* n.4 (quoting *Associated Press v. United States*, 326 U.S. 1 (1945)).

Despite the national importance of diversity of ownership of mass media, until adoption of the FCC's 1978 *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978) (hereinafter *Policy Statement*), minorities, particularly African Americans, had little access to broadcast properties as owners. When Congress passed the Radio Act of 1927, African Americans, due to the vestiges of slavery and *de jure* and *de facto* segregation, had no opportunity to own radio stations. No American broadcast station was owned by an African American until Jesse B. Blayton purchased an existing station, WERD(AM), in 1949.[2] It was not until 1956 that a company owned by African Americans was granted a construction permit to build a new broadcast station.[3] It was against this backdrop that the FCC's minority ownership policies were developed.

In 1978, the FCC announced the adoption of the distress sale policy in its *Policy Statement*. In adopting the *Policy Statement* the Commission described at length the need for the distress sale policy. The Commission explained that in 1968 it first articulated the need to assure that broadcast licensees did not discriminate against racial minorities in their employment practices. *See Petition for Rulemaking to Request Licensees to Show Discrimination in their Employment Practices*, 13 F.C.C.2d 766 (1968). In 1968 the Commission stated:

> we simply do not see how the Commission could make the public interest findings as to a broadcast applicant who is deliberately pursuing or preparing to pursue a policy of discrimination—of violating the National Policy.

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[2] M. Muhammed, *Minority Participation in Broadcasting*, Dollars & Sense, May/June 1979, at 18.

[3] *Id.*

Id. at 767.

A year later, the Commission adopted rules which prohibited discrimination by broadcast licensees in employment on the basis of "race, color, religion or national origin" and also required that "equal employment opportunity in employment . . . be afforded by all licensees or permittees . . . to all qualified persons." *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240 (1969). In 1970, the Commission adopted rules requiring most broadcast licensees to file annual employment reports and to file a written equal employment opportunity program when filing certain application forms. *See Nondiscrimination Employment Practices of Broadcast Licensees*, 23 F.C.C.2d 430 (1970). In 1975, the Commission reiterated and clarified its policy on employment discrimination. *See Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 54 F.C.C.2d 354 (1975). In 1976, the Commission adopted a Model EEO Program to be followed by all broadcast licenses. *See Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 F.C.C.2d 226 (1976).

The Commission explained in its *Policy Statement* that it had taken other actions to assure that the needs, interests and problems of a licensee's community, including the minorities within that community, were both ascertained and treated in the programming of the licensee. Under the Commission's ascertainment guidelines, broadcast licensees were required to contact minorities, as well as nineteen other specified groups in the communities they served, to determine community interests so that the licensee could present programming responsive to those interests. *See Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C.2d 418 (1976).

After recounting this long list of very careful and considered measures to increase minority input into broadcast programming the Commission then pointed out the inadequacy of these measures:

> While the broadcasting industry has on the whole responded positively to its ascertainment obligations and has made significant strides in its employment practices, we are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the nonminority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment.

Policy Statement, 68 F.C.C.2d at 981.

In making this determination, the Commission explained that it was basing its conclusion on specific findings it had made in its *Report on Minority Ownership in Broadcasting* (May 17, 1978) (hereinafter *Minority Ownership Task Force Report*). The *Minority Ownership Task Force Report* developed much of its information from testimony given by witnesses at a two-day minority ownership conference held April 25-26, 1977 at the Commission. In its *Minority Own-*

ership Task Force Report the Commission recognized the acute under representation of minorities among broadcast station owners (at that time it was less than one percent, while today it is still less than two percent). The conference was held to provide the participants with an opportunity to identify obstacles confronting minorities seeking to obtain broadcast licenses and to define possible means of overcoming the obstacles to ownership. *Minority Ownership Task Force Report*, at 1. Conference participants included representatives from diverse races, professions, government and private enterprise. *Id.*

In its *Minority Ownership Task Force Report*, the Commission began by noting that:

> The touchstone of the Communications Act of 1934, as amended, is 'to make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide, and world-wide radio communications service . . .' In 1934 when the Communications Act was signed into law, public policy on the assimilation of minorities into the communications industry was nonexistent. Indeed, Blacks, Latin Americans, Asians and American Indians were isolated from the mainstream of American life by generations of racial discrimination and disadvantage.

Id. at 2-3 (footnotes omitted).

The Commission went on to state:

> In recent years, all Americans witnessed the struggle to eliminate the vestiges of racial discrimination in the nation. The mere dismantling of formal racial barriers, however,

> has not solved all problems created by generations of racial prejudice. Nor has it brought minority racial groups fully into the mainstream of our pluralistic society.
>
> Centuries of discrimination have isolated racial minorities from society in general, not only by substantially different attitudes and experiences, but also by continued economic disadvantage. Racial prejudice has prevented racial minorities from being assimilated into the mainstream of society. This prejudice, spanning centuries, has created not only a physical distance but a psychological distance between racial minorities and the members of society.
>
> Generations of discrimination have created a form of racial caste. In the view of the panelists a direct result of the general societal discrimination has been the under representation of these minorities in the ownership of broadcast stations as well as other communications facilities. Various panelists suggested that if the inequities of the past are to be corrected they must be treated by measures which go beyond mere 'neutrality'.
>
> The courts and Congress have realized that in order to deal with the lingering vestiges of racial discrimination, remedial measures taking race and other factors into account are constitutionally permissible. A number of panelists believe that an affirmative policy to remedy the effects of past societal discrimination is necessary in view of the present

> level of minority participation in broadcast ownership.

Id. at 6-8 (footnotes omitted).

The Commission went on to discuss some of the key obstacles the conference participants described.

> Various panelists noted that buying an attractive broadcast property is especially difficult because potential minority owners are excluded from knowledge of the availability of such stations. In the opinion of the panelists, information from brokers seems to be reserved for certain clients. The panelists characterized this system of exclusion as the "old boy network". This is significant because, once the owner of a station has agreed to sell, and a buyer is found qualified, the Commission is prohibited from considering whether any third party may be better qualified.

Id. at 9 (footnote omitted).

Analyzing the findings of its *Minority Ownership Task Force Report* in the *Policy Statement*, the Commission stated:

> It is apparent that there is a dearth of minority ownership in the broadcast industry. Full minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming. In addition, an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum. And, of course, we have long been committed to the concept of diversity of control because 'diversification . . . is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities.'
>
> What is more, affecting programming by means of increased minority ownership—as is also the case both with respect to our equal employment opportunity and ascertainment policies—avoids direct government intrusion into programming decisions.

Policy Statement, 68 F.C.C.2d at 4 (quoting *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965)).

The Commission then concluded:

> We believe that diversification in the areas of programming and ownership—legitimate public interest objectives of this Commission—can be more fully developed through our encouragement of minority ownership of broadcast properties. In this regard, the Commission is aware of and relies upon court pronouncements on this subject.

Id. at 4 (citations omitted).

The Commission then proceeded to announce the extension of its distress sale policy so as to allow a licensee in danger of having its license revoked to assign its license to a minority owned applicant:

> [I]n order to further encourage broadcasters to seek out minority purchasers, we will permit licensees whose licenses have been des-

ignated for revocation hearing, or whose renewal applications have been designated for hearing on basic qualification issues, but before the hearing is initiated, to transfer or assign their licenses at a "distress sale" price to applicants with a significant minority ownership interest, assuming the proposed assignee or transferee meets our other obligations.

> While we normally permit distress sales when the licensee is either bankrupt or physically or mentally disabled, there is precedent for such sales based on other grounds .... We contemplate grants of distress sales in circumstances similar to those now obtaining except that the minority ownership interests in the prospective purchaser will be a significant factor. The parties involved in each proposed transaction will be expected to demonstrate to us how the sale would further goals on which we are today basing the extension of our distress sale policy. All such transactions will be scrutinized closely to avoid abuses.

Id. at 7.

The above detailed description of the steps taken by the FCC to encourage minority involvement in programming decisions demonstrates clearly that the FCC developed a full record upon which it based its determination that there was a compelling interest in promoting diversity of ownership by minorities through use of the distress sale policy.

IV. THE DISTRESS SALE POLICY IS NARROWLY TAILORED TO ACHIEVE DIVERSITY OF CONTROL OF BROADCAST STATIONS THROUGH ENCOURAGEMENT OF MINORITY OWNERSHIP

The preceding description of the record developed by the FCC and repeatedly approved by Congress demonstrates not only the compelling interest being addressed by this policy, but also demonstrates that the policy is narrowly tailored to serve that compelling interest. The preceding description of the FCC's race-neutral efforts, beginning in 1968, to encourage employment of minorities by broadcast licensees, and to require ascertainment of minority programming interests by all licensees, demonstrates that the distress sale policy was adopted only after these other extensive race-neutral efforts failed to produce any significant results in diversifying the control of broadcast programming decisions.

Moreover, the distress sale policy is also narrowly tailored to minimize any burden on nonminorities. First, it is only through Commission action (designation of a license for a revocation hearing) that the circumstances which would permit a distress sale can arise. Second, the distress sale policy is elective. No licensee is ever obligated to sell to a minority. Third, the distress sale policy does not establish any quotas. Indeed, in practice, the policy has had limited impact, because it has been available so infrequently. From 1979 to 1987 only 38 distress sales were approved by the Commission, while the Commission approved 9000 sales of broadcast stations. Thus, distress sales represented 0.4% of station sales during that time period. *See* FCC C.A. Pet. for Rehearing and Suggestion

for Rehearing En Banc, at 11-12. Finally, the distress sale policy does not deprive anyone of a vested right. Persons interested in acquiring a station in a license revocation hearing have no rights to the specific license at issue in that hearing. Given that only 0.4% of broadcast stations have been sold using this policy since its inception, the burden of not being able to purchase a station in a distress sale situation impacts nonminorities only negligibly.

Thus, the distress sale policy is analogous to the *Fullilove* set-aside plan in that it has only a small impact on nonminorities. *See Fullilove*, 448 U.S. at 484-85 n.72 (Burger, C.J.). In *Fullilove* Chief Justice Burger noted that it was "not a constitutional defect in [the minority business enterprise set-aside provision] that it may disappoint the expectations of nonminority firms." *Id.* at 484. He added that this was especially true given that the 10% minimum minority participation requirement translated into only 0.25% of the annual expenditure for construction work in the United States. *Id.* at 484-85 n.72. Therefore, the slight 0.4% impact on prospective station applicants which results from operation of the distress sale policy is consistent with the level of impact found permissible in *Fullilove*.

Similarly, the degree of impact on specific applicants, such as Shurberg Broadcasting of Hartford, Inc. ("Shurberg"), does not cause the policy to fail under constitutional scrutiny. In *Wygant* the Court struck down a preferential layoff plan, but distinguished between preferential layoff plans and hiring plans. *Wygant*, 476 U.S. at 282-83 (Powell, J.). In his *Wygant* opinion, Justice Powell observed that, "Denial of a future employment opportunity is not as intrusive

as loss of an existing job." *Id.* Indeed, as Judge Wald recognized below, if the qualifications of the prior licensee of the television station had not come into question, there would have been no opportunity for Shurberg to pursue. *See Shurberg*, 876 F.2d at 951 (Wald, C.J., dissenting). The potential availability, of the broadcast station license was merely fortuitous and did not carry with it the kind of settled expectations protected by the Court in *Wygant*. A potential applicant for a license, such as Shurberg, is analogous to a job applicant, and the impact the distress sale policy places on Shurberg is permissible under the *Wygant* analysis.

CONCLUSION

For the reasons set forth above, the National Association of Black Owned Broadcasters, Inc. requests that the Court reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit and reinstate the Federal Communications Commission's grant of the assignment of license of WHCT(TV), Hartford, Connecticut, to Astroline Communications Company Limited Partnership.

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